Petition

81-1790

Supreme Court, U.S.
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In The
Supreme Court Of The United States

OCTOBER TERM, 1981

No._____

BRIDGEPORT EDUCATION ASSOCIATION,
Petitioner,

v.

CITY OF BRIDGEPORT, ET AL,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARTIN A. GOULD
37 Lewis Street
Hartford, CT 06103

Counsel for Petitioner

QUESTION PRESENTED

Whether a District Court in a school desegregation case encompassing claims of discrimination in hiring and promotion of teachers and administrators may order the imposition of hiring and promotion quotas and the suspension of local civil service laws governing promotion as a remedy without considering any evidence, scrutinizing alternatives or making appropriate findings that this action is necessary.

PLAINTIFFS AND DEFENDANTS

Freddie Crumpton, Jeannette Joyce, David Joyce, Martha Looney, Donna Looney, Lucille Lloyd, Renee Lloyd, Winifred Timberlake, Henry Timberlake, John G. Craig, Anthony Craig, June Rhodes, Jerry Rhodes, Minnie Bellew, Melvin Bellew, Omah Harper, Keither Harper, Bettina Harper, Blanche Burchette, Anthony Burchette, Woodrow Taylor, Genith Taylor, Jane Bass, Felicia Bass, Roselyn Bass, Edith Kennedy, Karen Kennedy, Joanne Kennedy, Mona Kennedy, Lydia Alvarado, Juan Alvarado, Edith Alvarado, Pamela Alvarado, Naomi Alvarado, Erma Vargas, Wanda Vargas, Felix Vargas, Ricky Vargas, Antonio Vargas, Mario Vargas, Blanca Rios, Martin Rios, Daryl Slade, Marion White, Debbie Grace, Joey Sosa, James Hardy, Milfred Santana, Ricky Sosa, Juanda Rodriques, NAACP, Bridgeport Chapter, Spanish American Development Association (SADA), Spanish American Coalition, Hall Neighborhood House, Beardsley Tenants' Association, Interdemoninational Ministers Alliance, East End Neighborhood Council, Federation of Neighborhood Councils, Citywide Council on Education, PACE Parent Group, and Herman Santana and Puerto Richan Youth Organization, and Maria Andino, Alfredo Andino, Jr., Miguel Andino, Marilyn Andino, Antonio Andino, Earlene Bentley, Kelvin Bentley, Monalisa Bentley, Tangiela Bentley, Pauline Boone, Erik Boone, Clarice Brower, Cynthronia Mendes, Morris Morey, Edna Castillo, Clemente Castillo, Myrna Castillo, Wilfredo Matos, Carolyn Matos, Aaliyah Salahuddin, Mustafa Salahuddin, Veda Salahuddin, Ricardo Santiago, Alina Santiago, Richard Santiago, Lucy Siberon, Gina Siberon and Gidgett Siberon,

PLAINTIFFS

Walter C. Chop in his capacity as Superintendent of Schools for the City of Bridgeport, the Bridgeport Board of Education, Howard Zinner, Anna B. Skane, Fleeta Hudson, Marietta Silvernail, Nancy Hornyak, Agnes Giannini, Michael Bisciglia, Victor Medina, Joel Kanter, in their capacity as officers and members of the

Bridgeport Board of Education, State Board of Education of Connecticut, Catherine V.A. Smith, Dayson D. DeCorsey, M. Adele Eads, June K. Goodman, Rose K. Lubchansky, John E. Toffolon, Chairman, George L. West, Herbert Duke, in their capacity as members and officers of the Board of Education of the State of Connecticut, Mark R. Shedd, in his capacity as Commissioner of Education of the State of Connecticut, John Mandanici, in his official capacity as Mayor of the City of Bridgeport, John G. Norko, in his official capacity as Comptroller of the City of Bridgeport and Louis Marcel, Edward Reich, Patricia Rayho, Sylvester Romano, William McMahon, Nicholas Mardozian and Carl Kleinknecht, in their official capacity as Members of the Board of Apportionment and Taxation of the City of Bridgeport,

DEFENDANTS

Bridgeport Education Association *Defendant-Intervenor*

Bridgeport Council of Administrators and Supervisors Local 46, AFSA, AFL-CIO

Defendant-Intervenor

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OCTOBER TERM, 1981

No._____

BRIDGEPORT EDUCATION ASSOCIATION,
Petitioner,

v.

CITY OF BRIDGEPORT, ET AL,
Respondents

The petitioner Bridgeport Education Association respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 23, 1981.

OPINION BELOW

The unreported opinion of the Court of Appeals appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Connecticut.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 23, 1981. A timely petition for rehearing en banc was denied on December 30, 1981, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42 §2000, et seq., §2000(d), §1981, §1983 and §1988. Rule III. 5 of the Rules of the Bridgeport Civil Service Commission, Sections 9 and 11 of the Civil Service Provisions of the Charter for the City of Bridgeport.

STATEMENT OF THE CASE

This action was brought on November 5, 1975, in the District Court for the District of Connecticut, seeking desegregation of the Bridgeport Schools. The jurisdiction of the District Court was invoked under Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000(e) et. seq., under 42 U.S.C., Sections 1981, 1983, and 1988 pursuant to Title 28 United States Code Section 1343(3), under the Fifth, Thirteenth and Fourteenth Amendments to the Constitution of the United States pursuant to the provisions of Title 28, U.S.C. §1331. The plaintiffs, respondents herein, claimed in part that the defendants, chiefly the Bridgeport Board of Education, discriminated against Blacks and Hispanics in promotion to supervisory positions within the school system, alleging that Blacks and Hispanics were substantially underrepresented in these positions. The complaint contained no specific allegations that the civil service provisions or the promotional examinations were discriminatory. On June 20, 1979, after considerable discovery, the parties submitted a proposed Consent Decree to the District Court for approval. On July 31, 1979, after a short hearing, the Consent Decree was entered by order of the District Court (Burns, J.). The order permanently enjoined the defendants from discriminating on the basis of race or national origin in the operation of the public schools of Bridgeport and further ordered the defendants to take all necessary steps to eliminate substantial racial imbalance and provide equal opportunity in the Bridgeport public schools. The decree further required the City defendants to

submit, for the Court's consideration, plans to eliminate substantial racial imbalance and provide equality of educational opportunity. There was no remedy provision contained in the Consent Decree.

On August 9, 1979, the Court granted the motion of the Bridgeport Education Association, petitioner herein, to intervene for participation in the remedy phase of the litigation so far as it related to the rights of members of Bridgeport Education Association in the terms and conditions of their employment.

On August 15, 1979, the City defendants submitted a plan for hiring minority teachers and administrators and moved for approval by the District Court.

In its Motion for Approval of a Plan for Hiring Minority Teachers and Administrators, the Board of Education sought, *inter alia*, to deviate from three Civil Service rules governing promotions. First, the Board requested that the 75 percent cut off requirement be suspended. This rule, which is contained in Rule III.5 of the Rules of the Bridgeport Civil Service Commission, provides that in order to pass any examination, a competitor is required to attain a percentage of 75 or over in each of the subjects of the examination. Second, the Board asked the Court to permit it to suspend the application of the general rule requiring the top candidate appearing on the Civil Service eligibility list be selected for appointment. Third, the Board requested the Court to allow for the abrogation of the "anonymity" rule of the City Charter which provides that the identity of the applicant not be disclosed to the examiner. These latter two rules are contained in the Civil Service provisions in the Bridgeport City Charter.

On August 30, 1979, a hearing was held for approval of the plan proposed by the Board of Education. In support of the plan, counsel for the Board of Education indicated that the Board had established as a goal a racial makeup of administrators of one-third Black, one-third White and one-third Hispanic. To reach

that goal, the Board of Education proposed that it would maintain a one to one hiring ratio and indicated that this ratio could be attained by the continuation of unspecified efforts by the Board to promote minorities to administrative positions. There was no other discussion either at this hearing or by way of written memorandum as to alternative methods of achieving this hiring ratio except for the contention by the Board of Education that the Civil Service Requirements discussed above would unduly inhibit its effort to reach the above goal. Furthermore, there was no evidence submitted by any party that the Civil Service provisions sought to be suspended were the cause of the discrimination in promotion to administrative positions. The Board of Education did argue in its brief in support of its Motion for Approval of Plan for Hiring Minority Teachers and Administrators, that in 1975 it had unilaterally ceased complying with the Civil Service Laws governing promotions, and that action had the effect of increasing the number of minority candidates eligible for promotion; but no evidence of this supposed effect was offered at the hearing on this motion.

On October 2, 1980, the District Court adopted the Board of Education's proposed order. In doing so, it suspended the implementation of every Civil Service provisions of the Charter of the City of Bridgeport which the Board of Education might claim to be contrary to its proposed, but unadopted, hiring procedure, including without limitation, the three Civil Service provisions referred to hereinabove. The District Court further ordered that these provisions be suspended until the percentage of minority and administrative staff approximates the percentage of minority workers in the Bridgeport area labor force.

On November 26, 1980, the Bridgeport Education Association appealed the District Court's order to the Court of Appeals for the Second Circuit. After the filing of briefs and oral argument, the Court of Appeals for the Second Circuit rendered an unpublished decision on November 23, 1981 affirming the District Court's order

and remanding the matter to the District Court for clarification of the term "Bridgeport Area Labor Force."

The Bridgeport Education Association timely petitioned the United States Court of Appeals for the Second Circuit for rehearing en banc. On December 30, 1981, that petition was denied.

REASONS FOR GRANTING THIS WRIT

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND THE COURTS OF APPEALS AS TO THE PROPER PROCEDURE AND STANDARD TO BE APPLIED IN ORDERING HIRING QUOTAS AND IN SUSPENDING APPLICABLE CIVIL SERVICE PROVISIONS.

Where the imposition of quotas and suspension of some or all of the applicable Civil Service provisions have been proposed as a remedy for past employment discrimination, the established case law in the Supreme Court and the Courts of Appeals requires that such relief must be granted as a last resort only after careful consideration of evidence, and rendition of findings of fact which demonstrate that this type of relief is a necessary means of rectifying the discrimination.

This Court has had occasion to discuss the standards applicable to formulating relief in school desegregation cases where the infringement of local or state authority to administer the school system has been proposed. In *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 97 S. Ct. 2766, 53 L. Ed. 2d 851 (1977), this Court held that while federal courts have authority to fashion broad relief in the form of restructuring the administration of the school system, such relief will only be permitted after factual proof is satisfactorily established and a reasoned statement of legal principles supporting such relief is enunciated by the court. This Court further held in *Dayton* that the

relief ordered must be shown to be necessary to eliminate the discrimination found to exist.

In so holding, this Court followed its earlier pronouncements with regard to a Court's power to restructure the operation of local and state entities. *Milliken v. Bradley*, 418 U.S. 717, 94 S. Ct. 3112, 41 L. Ed.2d 1069 (1974); *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed.2d 554 (1971). In *Bradley*, this Court held that once a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the violation. 418 U.S. at 744, 94 S. Ct. 3112, 41 L. Ed. 2d 1069.

While the above cases dealt specifically with the restructuring of the pupil populations in these school systems, a similar standard has been imposed by the courts where a suspension of Civil Service provisions has been proposed as a remedy for past employment discrimination. *Bridgeport Guardians v. Bridgeport Civil Service Commission*, 354 F. Supp. 778 (D. Conn. 1973), aff'd in part, rev'd in part and remanded, 482 F. 2d 1333 (2d Cir. 1973), cert. denied, 421 U.S. 991, 95 S. Ct. 1997, 44 L. Ed.2d 481 (1975); *Chance v. Board of Examiners*, 561 F. 2d 1079 (2d Cir. 1977); *Kirkland v. New York State Department of Correctional Services*, 520 F. 2d 420 (2d Cir. 1975) cert. denied, 429 U.S. 823, 97 S. Ct. 73, 50 L. Ed. 2d 84 (1976); *U.S. v. City of Chicago*, 549 F. 2d 415 (7th Cir. 1977) cert. denied, 434 U.S. 875, 98 S. Ct. 225, 54 L. Ed.2d 155 (1977).

In *Kirkland v. New York State Department of Correctional Services, supra*, the Court of Appeals for the Second Circuit was asked to suspend all Civil Service requirements which contributed to discriminatory promotion practices for sergeant's postions in the Department of Corrections. The Court found the examination for promotion to be invalid and required the defendant to draw up a new exam which conformed with EEOC testing guidelines. In holding that the use of the newly validated test would be sufficient, the

Court noted that it was unnecessary to abolish any other Civil Service requirements such as eligibility lists and procedures for hiring off that list. That opinion is instructive in establishing the limits within which a Court may interfere with Civil Service laws when faced with equal employment opportunity complaints.

> Civil Service Laws, like civil rights laws, were enacted to ameliorate a social evil. In the former case, it was the spoils system; in the latter discrimination. To the citizens of the State of New York, civil service was sufficiently important that they mandated its use by their constitution. In so doing, they "declared in unmistakable terms that merit, ascertained as therein provided, shall govern appointment and promotions in the public service," and "merit must be ascertained as far as practicable by competitive examination.
>
> The Congress recognized the social benefits inherent in a system of promotion based upon merit when it provided that "it shall not be an unlawful employment practice for an employer to apply different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system." As pointed out by the Court in *Griggs, supra*, Congress did not intend "to guarantee a job to every person regardless of qualifications."
>
> The attack upon the content of civil service examinations, illustrated by *Vulcan* and *Bridgeport*, merely heralds future confrontations between the advocates of equal employment opportunities and the supporters of our civil service system. In the offing, surely, is an attack upon the provisions of § 61 of the New York Civil Law which requires that appointment from an eligible list be made from one of the three persons standing highest on the list. It seems to us that the judiciary should act with

> great reluctance in undermining traditional civil service concepts; and, if a decision is to be made to subordinate the social purposes of civil service to those of equal employment opportunity, that decision should be made by the people speaking through their legislators. 520 F. 2d at 428 and 429.

Chance v. Board of Examiners, supra, involved an appeal of an order requiring suspension of the use of an existing civil service examination for promotion until a newer validated one was developed. The plaintiffs claimed discrimination in hiring of supervisory personnel by the New York City Board of Education. In a consent decree signed by the District Court, it was determined that the promotion examination was invalid. The Court ordered that an interim system for selection be utilized by the defendant which barred the use of the existing examination. On appeal, the Second Circuit held that the temporary abolition of examinations most likely violated the state civil service laws as well as the state constitution. However, it was unwilling to issue a definitive ruling and remanded the case to the state court for a determination of that question. In so doing, the Court stated that "we agree with the examiners that a Federal Court which is shaping a remedy for a Constitutional violation should, other things being equal, choose among alternatives the one which is consistent with state law . . ." 561 F. 2d at 1088.

Judge Newman's District Court opinion in *Bridgeport Guardians v. Bridgeport Civil Service Commission, supra,* which was substantially affirmed by the Second Circuit is also pertinent.

In the *Bridgeport* case, the plaintiffs challenged the validity of the tests for entry level policemen's positions. Judge Newman found the exams to be not sufficiently job related and therefore invalid. He ordered the development and use of new exams and, in addition, imposed quotas for hiring. In revising the very same Civil Service rules now being challenged, Judge Newman held that:

> Criteria and procedures to be used in determining qualifications for the minority pool and plans for recruiting qualified candidates for the minority pool shall be submitted to the Court for review and approval before being used. Exemption from state and local restrictions will be approved *where necessary* to effectuate this decree. 354 F. Supp. at 799. (emphasis added).

The decision of the Seventh Circuit in *U.S. v. City of Chicago, supra,* is also instructive on the question of abrogation of Civil Service or other statutory personnel policies in fashioning a remedy for Civil rights violations. That case involved claims of discrimination against the Chicago Police department in hiring and promotions. The trial court found for the plaintiffs and ordered mandatory quotas. It held that the testing procedure established by state statute disparately impacted upon minorities and women and was not job related. That statute, like the one in question here, provided that only those persons who passed a qualifying examination could be placed on the eligibility roster and that hiring for that position had to be from the eligibility roster in rank order.

The trial court's order permitted the city to disregard the roster of candidates after the quotas had been fulfilled. This, the Court of Appeals found to be excessive. It held that insofar as these statutory provisions violate Title VII, their operation must be suspended. However, the Court concluded that:

> . . . the fact that the general testing procedure set up by the Illinois legislature, as put into practice by the City produced results which conflicted with federal civil rights legislation did not give the district court an unbridled license to replace the state's method for selecting police officers with its own. 549 F. 2d at 438.

In so stating, the Court determined that the trial court should have constructed its remedy to preserve as much of the Illinois statutory scheme as possible.

Thus, each of the cases cited above emphasizes that a court must tread carefully over established Civil Service procedures, especially those which are contained in state or local laws, when formulating a remedy for past discrimination. They further demonstrate that before these Civil Service provisions are suspended, evidence must be presented to show that these Civil Service policies are responsible for the discrimination and that their suspension is the least disruptive means of alleviating this past discrimination.

In addition to ordering the complete abrogation of the Civil Service provisions governing hiring and promotion, the district court in the case at bar imposed a hiring quota which required the Board of Education to hire minority administrative and supervisory staff on a one to one ratio with white supervisors and administrators hired, until the percentage of minority administrative and supervisory staff approximates the percentage of minority workers in the Bridgeport area labor force. While the Court of Appeals remanded this order to the district court for a more exact definition of Bridgeport area labor force, it upheld the imposition of this quota.

The question of hiring quotas has undergone considerable analysis by the Supreme Court and the Court of Appeals. *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978); *Fullilove v. Klutznick*, 448 U.S. 448, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976).

This Court has made it quite clear that whenever preferential treatment based on race is proferred as a solution to past discrimination, the racial and ethnic distinctions created call for the most exacting judicial examination. *Regents of the University of California v. Bakke, supra.* Even when approving preferential relief in cases involving employment discrimination, such relief has been permitted by this Court only after proof of a

constitutional or statutory violation as well as a finding of necessity for suc' .elief to make the victims whole for injuries suffered on account of unlawful discrimination. *Franks v. Bowman Transportation Co., supra.*

The Court of Appeals for the Second Circuit has condoned quota relief. However, in approving such relief, it has established a test to be applied before quota relief can be imposed. It must first be determined that there has been a clear cut pattern of long and egregious discrimination. If this is found to be true, the court must decide whether the reverse discrimination imposed by the quota is identifiable and concentrates upon a relatively small and ascertainable group of nonminority persons who will be compelled to forego legitimate expectations. *Kirkland v. New York State Dep't of Correctional Services, supra; E.E.O.C. v. Local 638,* 532 F. 2d 821 (2d Cir. 1976).

The implementation of this test is best demonstrated in *Association Against Discrimination v. City of Bridgeport,* 454 F. Supp. 751 (D. Conn. 1978), rev'd, 594 F. 2d 306, (2d Cir. 1979), on remand, 479 F. Supp. 101 (D. Conn. 1979), aff'd, 647 F. 2d 256 (2d Cir. 1981), cert. denied 50 U.S.L.W. 3695 (1982). This case involved claims of discrimination in hiring and promotion in the City's fire department. The plaintiffs challenged the validity of the entry level examination as being discriminatory and not job related. The District Court found for the plaintiffs on the issue of liability and imposed sweeping affirmative relief including hiring quotas. On appeal, the Court of Appeals admonished the trial court for imposing quotas without conducting an examination to determine: (1) if the City had a long history of discrimination in its hiring policies; (2) if reducing the passing score on the challenged examination might effect the disparate impact of the challenged examination on minorities and (3) if the reverse discrimination imposed by the quotas concentrated on a small and ascertainable group of nonminority persons who would be compelled to forego legitimate expectation in the interest of correcting the effects of past discriminations.

It reversed the District Court's order and remanded the case to that Court for determination of a remedy consistent with its dictates.

On remand, the District Court conducted a hearing and found that the statistical evidence combined with the City's continued failure to recruit minorities constituted a pattern of egregious discrimination. The trial court also determined that reducing the passing grade would not eliminate the disparate impact. After making these findings, the court concluded that a new examination had to be created and that a temporary quota was appropriate.

Other Courts of Appeals have adopted similar guidelines to be adhered to before sanctioning quotas. In *United States v. City of Chicago, supra,* the Court of Appeals noted that before the extraordinary remedy of quota relief could be approved as a means of rectifying past discrimination in employment, its use had to be justified by the particular circumstances of the case. Similarly, in *Dawson v. Pastrick,* 600 F. 2d 70 (7th Cir. 1979), the Court of Appeals affirmed the District Court's refusal to impose a hiring quota, recognizing quotas as a remedy of last resort, and concluded that the evidence did not establish that a less drastic remedy would prove ineffective to correct the effects of past discrimination.

It is quite clear that in order to determine that quota relief is an appropriate remedy for past discrimination a Court must conduct an evidentiary hearing and render findings in sufficient detail to make meaningful review possible. *Dawson v. Pastrick, supra; Bryan v. Pittsburgh Plate Glass Co.,* 494 F. 2d 799 (3rd Cir. 1974); cert. denied 419 U.S. 900, 95 S. Ct. 184, 42 L. Ed. 2d 146 (1974); *Association Against Discrimination v. City of Bridgeport, supra; U.S. v. City of Alexandria,* 614 F. 2d 1358 (5th Cir. 1980).

In *Dawson v. Pastrick, supra,* the district court held a hearing on the liability and remedy issues which

remained unresolved by consent decree. In so doing, the court declined to impose mandatory quotas, but instead ordered the City to conduct affirmative recruitment of minorities. The Court of Appeals approved the trial court's refusal to impose hiring quotas and in so doing, held that before imposing preferential numerical relief, the trial court had to consider evidence and render findings which would indicate whether a less drastic remedy would prove effective in correcting the effects of past discrimination.

In *U.S. v. City of Alexandria, supra,* the Court of Appeals for the Fifth Circuit was asked to reverse the trial court's refusal to approve a consent decree requiring quota relief. While the Court of Appeals noted that its power to review consent decrees is limited, it held that de novo review was manifest since the trial court had heard no evidence at the time the consent decree was presented for approval. The Court thereafter conducted a de novo review of the propriety of the decree and reversed the trial court's order.

All of the above cases make it clear that in effectuating a remedy for past discrimination in employment, a trial court must exercise caution in suspending Civil Service requirements. They further demonstrate that quota relief can not be imposed without sufficient proof that there is no remedy less drastic to redress a long history of egregious discrimination and that the imposition of such quotas will not concentrate on a small group of nonminority persons who will be compelled to forego legitimate employment expectations. Finally, they establish that these questions must be answered by an evidentiary hearing and by sufficient findings of fact.

In rendering its decision on this appeal, the Court of Appeals for the Second Circuit erred in holding that the District Court's order suspending Civil Service provisions and imposing a quota was proper. Simply because the suspension of Civil Service provisions and imposition of quotas is within a District Court's discretion in alleviating past discrimination does not mean

that a court has the power to do so without, at a minimum, determining first whether such a suspension is necessary and then indicating, by way of findings, the reasons why such action is necessary. Yet, in ordering the suspension of the Civil Service provisions and imposing a quota in this case, the District Court did not even hold an evidentiary hearing. At no time was it presented with, nor did it consider, evidence as to whether these Civil Service provisions were responsible in whole or in part for the racial imbalance in the Bridgeport Schools. Assuming that more minority administrators were hired after the Board of Education unilaterally ceased complying with Civil Service laws in 1975, that increase in hiring minorities could be the result of more minority teachers in the pool from which to hire administrators, more minority applicants, and any of a host of other reasons. But there is nothing in the record to indicate that it was the utilization of Civil Service prior to 1975 which resulted in the few numbers of minority administrators. No evidence was offered to show that the cutoff score on promotional exams established by these Civil Service provisions had a discriminatory impact on minorities or that a simple reduction in the cutoff score would not have alleviated that disparity. Indeed, how could the Court of Appeals know whether the District Court considered other less drastic measures short of eliminating Civil Service for the foreseeable future, when the trial court rendered no findings of fact whatever? The District Court's failure to conduct such an evidentiary inquiry and to make findings of fact rendered the decision of the Court of Appeals approving the suspension of these Civil Service provisions and the imposition of a quota, in clear conflict with the law established by this Court and the Court of Appeals in other circuits.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

MARTIN A. GOULD
37 Lewis Street
Hartford, Connecticut 06103
Counsel for Petitioner

Appendix

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Supreme Court Of The United States

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APPENDIX

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UNITED STATES COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
New York 10007

A. DANIEL FUSARO
Clerk

PLEASE REFER TO THIS COURT'S DOCKET NUMBER IN ALL MATTERS.

November 23, 1981

Re: OTTO CRUMPTON et al v.
WALTER CHOP, et al
80-9101

Dear Sir:

The Court has today handed down a decision in the above entitled cause affirmed and remanded the decision of the district court.

Judgment has been entered today and a mandate will issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Your attention is directed to the provision of Rule 39(c) F.R.A.P. requiring the itemized and verified bill of costs, if any, tc be filed within 14 days after entry of judgment, with proof of service.

Very truly yours,

A. DANIEL FUSARO,
Clerk

By: Eileen Richards
Assistant Clerk

UNITED STATES COURT OF APPEALS
For The Second Circuit

Filed November 23, 1981

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the day of October, One Thousand Nine Hundred and Eighty-one.

PRESENT:

HON. WALTER R. MANSFIELD, Circuit Judge
HON. ELLSWORTH A. VAN GRAAFEILAND, Circuit Judge
HON. AMALYA L. KEARSE, Circuit Judge

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

OTTO CRUMPTON, FREDDIE CRUMPTON, JEANETTE JOYCE, DAVID JOYCE, MARTHA LOONEY, DONNA LOONEY, LUCILLE LLOYD, RENEE LLOYD, WINIFRED TIMBERLAKE, HENRY TIMBERLAKE, JOHN G. CRAIG, ANTHONY CRAIG, JUNE RHODES, JERRY RHODES, MINNIE BELLEW, MELVIN BELLEW, OMAH HARPER, KEITH HARPER, BETTINA HARPER, BLANCHE BURCHETTE, ANTHONY BURCHETTE, WOODROW TAYLOR, GENITH TAYLOR, JANE BASS, ROSELYN BASS, EDITH KENNEDY, KAREN KENNEDY, JOANNE KENNEDY, MONA KENNEDY, LYDIA ALVARADO, JUAN ALVARDO, EDITH ALVARDO, PAMELA ALVARDO, NAOMI ALVARADO, ERMA VARGAS, WANDA VARGAS, FELIX VARGAS, RICKY VARGAS, ANTONIO VARGAS, MARIO VARGAS,

BIANCA RIOS, MARTIN RIOS, DARYL SLADE, MARION WHITE, DEBBIE GRACE, JOEY SOSA, JAMES HARDY, MILDRED SANTANA, RICKY SOSA, JUANDA RODRIQUEZ, NAACP BRIDGEPORT CHAPTER, SPANISH AMERICAN DEVELOPMENT ASSN. (SADA), SPANISH AMERICAN COALITION, HALL NEIGHBORHOOD HOUSE, BEARDSLEY TENANTS, ASSN., INTERDENOMINATIONAL MINISTERS ALLIANCE, EAST END NEIGHBORHOOD COUNCIL, FEDERATION OF NEIGHBORHOOD COUNCILS, CITYWIDE COUNCIL ON EDUCATION, PACE PARENT GROUP, AND HERMAN SANTANA, PUERTO RICAN YOUTH ORGANIZATION, MARIA ANDINO, ALFREDO ANDINO, JR., MIGUEL ANDINO, MARILYN ANDINO, ANTONIO ANDINO, EARLENE BENTLEY, KELVIN BENTLEY, MONA LISA BENTLEY, TANGIELA BENTLEY, PAULINE BOONE, ERICK BOONE, CLARICE BROWER, CYNTHRONIA MENDES, MORRIS MOREY, EDNA CASTILLO, CLEMENTE CASTILLO, MYRNA CASTILLO, WILFRED MATOS, CAROLYN MATOS, AALIYAH SALAHUDDIN, MUSTAFA SALAHUDDIN, VEDA SALAHUDDIN, RICARDO SANTIAGO, ALINA SANTIAGO, RICHARD SANTIAGO, LUCY SIBERON, GINA SIBERON, GIDGETT SIBERON,

Plaintiffs, Appellees,

ORDER
80-9101

v.

CHOP, WALTER C., INC., and in his capacity as Superintendent of schools for the City of Bridgeport, THE BRIDGEPORT BOARD OF EDUCATION, ZINNER, HAWARD; SKANE, ANNA B.; HUDSON, FLEETA; SILVERNAIL, MARIETTA; HORNYAK, NANCY; GIANNINI, AGNES; BISCIGLIA, MICHAEL; MEDINA, VICTOR; KANTER, JOEL, individually and in their capacity as officers and members of the Bridgeport Board of Education,

STATE BOARD OF EDUCATION OF CT., SMITH, CATHERINE V.A.; DECORSEY, DAYSON D.; EADS, M. ADELE; GOODMAN, JUNE K.; LUBCHANSKY, ROSE K.; TOFFOLON, JOHN E.; Chairman, WEST, GEORGE L.; DUKE, HERBERT, individually and in their capacity as Members and Officers of the Board of Education of the State of Ct., SHEDD, MARK R., individually and in his capacity as Commissioner of Education of the State of Ct.,

Defendants-Appellees,

MANDANICI, JOHN, Mayor, City of Bridgeport; NORKO, JOHN G., Comptroller, City of Bridgeport, MARCEL, LOUIS; RICH, EDWARD; RAYHO, PATRICK; ROMANO, SYLVESTER; McMAHON, WILLIAM; NARDOLZIAN, NICHOLAS and KLEINKNECHT, CARL; Members of the Board of Appointment and Taxation of the City of Bridgeport,

Additional Party Defendants,

BRIDGEPORT COUNCIL OF ADMINISTRATORS and SUPERVISORS, Local 46, AFSA, AFL-CIO,

Defendant-Intervenor-Appellee,

BRIDGEPORT EDUCATION ASSOCIATION

Defendant-Intervenor-Appellant.

Intervenor-appellant, the Bridgeport Education Association, appeals from an order of the United States District Court for the District of Connecticut (Burns,J.) entered October 2, 1980, which directed the "City Defendants (the Bridgeport Board of Education, the Mayor, the Board of Apportionment and Taxation, and the City Controller), to recruit and hire minority administrative and supervisory staff on at least a one-to-one ratio with new white staff until "the percentage of minority administrative and supervisory staff approximates the percentage of minority workers in the Bridgeport area labor force."

Plaintiffs, the class of Black and Hispanic students and parents in the Bridgeport City school district, brought this action on November 5, 1975. On June 20, 1979, the parties filed a proposed consent decree. In support of the proposed decree the parties stipulated certain facts which the City Defendants admit established "that there was an underrepresentation of minority teachers and administrators resulting from the historical pattern of hiring and promotion." The consent decree establishing liability was approved by the district court after a hearing and entered July 31, 1979.

Shortly before the proposed consent decree was filed the Bridgeport Education Association, the union representing Bridgeport teachers, moved for limited leave to intervene as a defendant. The motion was granted but the participation of the intervenor was limited to the remedy phase of the litigation.

The court ordered suspension of specific civil service provisions and of certain portions of the collective bargaining agreement between the teachers and the school district was proper. Nevertheless the order was impermissibly vague. The term "Bridgeport area labor force" was not defined in the order or in the record. This is a matter of some significance since the suspension of civil service regulations was intended to be temporary. Major desegregation cases do indeed often require a period of judicial intervention to effect a remedy, but the order should more clearly define the ultimate goal so that all interested persons will be assured that federal judicial intervention in local affairs will come to an end.

This matter is remanded to the district court for clarification of the term "Bridgeport area labor force" and otherwise affirmed.

/s/ Hon. Walter R. Mansfield

/s/ Hon. Ellsworth A. Van Graafieland

/s/ Hon. Amalya K. Kearse

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 30th day of December, one thousand nine hundred and eighty-one.

OTTO CRUMPTON et al.,
Plaintiffs-Appellees,

v.

No. 80-9101

WALTER C. CHOP, INC., et al.,
Defendants-Appellees,

JOHN MANDANICI et al.,
Additional Party Defendants,

BRIDGEPORT COUNCIL OF ADMINISTRATORS AND SUPERVISORS, LOCAL 46, AFSA, AFL-CIO,
Defendant-Intervenor-Appellee,

BRIDGEPORT EDUCATION ASSOCIATION,
Defendant-Intervenor-Appellant.

Filed December 30, 1981

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-intervenor-appellant, Bridgeport Education Association.

Upon consideration by the panel that heard the appeal, it is ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro
Clerk

By Francis X. Gundhait
Chief Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Microfilm Oct. 3, 1980

OTTO CRUMPTON, ET AL	)	CIVIL ACTION NO. B-75-351
v.	)	October 2, 1980
WALTER C. CHOP, ET AL	)	

ORDER ON HIRING MINORITY

TEACHERS AND ADMINISTRATORS

This matter came on to be heard on the Motion of the City Defendants for approval of a plan for hiring minority teachers and administrators, and after reviewing the plan, and hearing argument from all parites,

IT IS ORDERED, ADJUDGED and DECREED that:

I. *Teachers* The City Defendants are directed to use their best efforts to recruit and hire minority teachers in such a manner that, on an annual basis, the total number of minority teachers hired shall at least equal the total number of white teachers hired, until the percentage of minority teachers in the Bridgeport Public Schools approximates the percentage of minority workers in the Bridgeport area labor force.

II. *Administrative and Supervisory Staff* The City Defendants are directed to use their best efforts to recruit and hire minority administrative and supervisory staff in such a manner that, on an annual basis, the total number of minority administrative and supervisory staff hired shall at least equal the total of white administrative and supervisory staff hired until the percentage

of minority administrative and supervisory staff approximates the percentage of minority workers in the Bridgeport area labor force.

A. It is hereby declared and adjudged that the Board's present administrative and supervisory staff, as listed on the attached Exhibit A, shall be considered appointments of the Board of Education made in full compliance with all applicable legal prerequisites to appointment.

B. It is further declared and adjudged that the Board may make appointments to administrative and supervisory positions in accordance with its proposed procedures without regard to the effect, if any, of Civil Service Provisions of the Charter of the City of Bridgeport and the Collective Bargaining Agreement between the Board and the BEA, claimed to be contrary thereto, including without limitation: (1) Rule III.5 of the Rules of the Civil Service Commission stating that "in order to pass any examination, a competitor is required to attain a percentage of 75 or over in each of the subjects which, pursuant to the public announcement, comprise the entire examination"; and (2) so much of Section 11 of the Civil Service Provisions of the Charter of the City of Bridgeport as states that "the personnel director shall certify the name of the person standing highest on the employment list established for the class"; and (3) so much of Section 9 of the Civil Service Provisions of the Charter of the City of Bridgeport provides that "no questions which are misleading or unfair in the nature of catch questions shall be asked, nor shall the identity of any applicant be disclosed to the examiner or to the one correcting the applicant's test" to the extent that such provision may require anonymity in the appointment process aside from written examinations. This subparagraph of this Order shall be in effect until the percentage of minority administrative staff of the Bridgeport Public Schools is approximately that of the minority local labor force.

C. The appointment of Alexander Norwood as Elementary Supervisor for the Bridgeport Public Schools, is declared and adjudged to be in full compliance with all applicable legal prerequisites to appointment.

Ellen B. Burns
UNITED STATES
DISTRICT JUDGE
October 2, 1980

Opposition

Office - Supreme Court, U.S.
FILED
APR 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1790

In the Supreme Court of the United States

OCTOBER TERM, 1981

BRIDGEPORT EDUCATION ASSOCIATION,
PETITIONER,

v.

CITY OF BRIDGEPORT, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Blanchard Press, Inc., Boston, Mass.—Law Printers

I

Question Presented

Whether a District Court, in a school desegregation case involving an underrepresentation of minority teachers and administrators, may approve a remedy which temporarily imposes a numerical goal for hiring additional minority teachers and administrators, and which temporarily suspends certain specific local civil service procedures.

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In the
Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1790

BRIDGEPORT EDUCATION ASSOCIATION,
PETITIONER,

v.

CITY OF BRIDGEPORT, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Statement of the Case

This is a school desegregation case from the United States District Court for the District of Connecticut. It was commenced on November 5, 1975 against various appointed or elected officials of the City of Bridgeport, Connecticut, collectively referred to in the litigation as the "City Defendants," and against the Commissioner of Education and the Board of Education of the State of Connecticut, collectively referred to in the litigation as the "State Defendants." The Plaintiffs, who were certified to represent the class of Black and Hispanic minority students and parents in the public schools of

Bridgeport, alleged that the City Defendants and the State Defendants had violated State and Federal statutes and the United States Constitution in the administration of the Bridgeport public schools, including racial discrimination against students, and in the hiring and promotion of minority teachers and administrators of the school system.

Four years of pretrial activities of the parties culminated in the entry of a consent decree on liability only, filed by the parties on June 20, 1979, and approved by the District Court, after a hearing, on July 31, 1979. In the consent decree, the parties stipulated that various acts and omissions of the City Defendants prior to the filing of the Complaint, when considered together and cumulatively, had resulted in racial segregation in and among some of the Bridgeport public schools, and that those acts and omissions had had some impact on the entire school system. The parties further agreed that various actions of the City Defendants since the filing of the Complaint had lessened, although not sufficiently, the racial imbalance in the Bridgeport public schools, and agreed that the City Defendants and the State Defendants had an affirmative obligation to eliminate substantial racial imbalance and to provide equality of educational opportunity in the Bridgeport public schools.

While the Plaintiffs, the City Defendants, and the State Defendants were negotiating the consent decree, the Bridgeport Educational Association ("BEA"), the collective bargaining representative of the teachers employed by the City Defendants, moved to intervene as a defendant. The BEA's motion was allowed. The Bridgeport Council of Administrators and Supervisors ("BCAS"), which represents the supervisors and administrators employed by the City Defendants, also moved to intervene and was allowed to do so shortly after the entry of the consent decree. The participation of both intervenors was limited to the remedy phase of the litigation insofar as the remedy related to the terms and conditions of employment of their members.

As part of the entry of the consent decree, the parties submitted a lengthy stipulation of facts which dealt with the school system, including staffing in the schools. They stipulated that there was an underrepresentation of minority teachers and administrators, resulting from historical patterns of hiring and promotion; that the efforts taken by the City Defendants since the filing of the Complaint in 1975 to increase the number of minorities had been successful; and that staff promotions were being effected outside the normal local civil service procedures specifically to increase the number of minority administrators.

The question of the applicability of local civil service procedures to the appointment or promotion of school administrators has been controversial for some time. The BEA has filed other legal actions, in both Federal and State courts, seeking a decree that the Board of Education must comply with all local civil service procedures. The BCAS, which represents school administrators, has attempted to prevent the Board from following such procedures when making appointments. The issue is now pending before a State court. No final determination of the question has yet been made in either the State or Federal courts.

The City Defendants' approach to increasing the number of minority staff members was to continue to appoint administrators without following three local civil service procedures:

1. Rule III.V, which states that "in order to pass any examination, a competitor is required to attain a percentage of 75 or over in each of the subjects which, pursuant to the public announcement, comprise the entire examination."
2. The portion of Section 11 of the Civil Service provisions of the Charter of the City of Bridgeport which states that "the personnel director shall certify the

name of the person standing highest on the employment list established for the class."

3. The portion of Section 9 of the Civil Service provisions of the Charter of the City of Bridgeport which provides that "nor shall the identity of any applicant be disclosed to the examiner or to the one correcting the applicant's test."

(See Appendix to the Petition for a Writ of Certiorari, at 9A).

Following entry of the consent decree, the City Defendants filed a series of reports and motions concerning particular aspects of the organization or administration of the school system, including a plan filed on August 15, 1979 for increasing minority representation among teachers and administrators by continuing the practice of appointments outside the contested local civil service procedures. The District Court had already received stipulated evidence that suspension of the procedures had enabled the City Defendants to double the percentage of minorities in the administrative staff from 10% in the 1975-1976 year to 19.6% at the time the motion was filed for approval of the plan to increase minority staff.

The motions of the City Defendants on remedy were the subject of various hearings and memoranda filed by the parties. The District Court took the motions under advisement, including the motion for minority hiring and promotion. The BEA did not appear at the hearing scheduled on that motion, and did not even file a memorandum concerning the motion until almost two months later, after specifically ordered to do so by the District Court. At no time has the BEA filed any plan as an alternative to the methods proposed by the City Defendants for increasong minority staff.

In September, 1980, at the start of the new school year, the City Defendants implemented those portions of their desegregation plan which had been approved by the District

Court. On October 2, 1980, the District Court acted upon the City Defendants' motion on hiring and promotion and entered the order requested by the City Defendants, which allowed them to continue their successful appointment and promotion procedures for administrative staff. The plan included the hiring of equal numbers of minorities and nonminorities until the percentage of minority staff approximates the percentage of minority workers in the "Bridgeport area labor force." The District Court made no specific determination as to the applicability of civil service procedures to the appointment of schools administrators when it approved the plan of the City Defendants, but suspended the three provisions.

The BEA appealed that remedy to the Court of Appeals for the Second Circuit and then obtained an extension of time for prosecuting the appeal. The case was then scheduled for a status conference by the Second Circuit in February, 1981, when the appeal was withdrawn subject to reinstatement. The BEA subsequently reinstated the appeal and filed its brief in the Court of Appeals. After oral argument, the Court of Appeals rendered an unpublished decision on November 23, 1981, affirming the District Court's order in part and remanding the matter in part to the District Court for clarification of the term "Bridgeport area labor force."

The BEA petitioned the Court of Appeals for rehearing en banc. On December 30, 1981, the petition was denied. The suggestion for rehearing en banc was "transmitted to the Judges of the [Second Circuit] Court in regular active service and to any other judge on the panel that heard the appeal and no such judge has requested that a vote be taken thereon." Petitioner's Appendix, 7 A. The BEA then filed a Petition to this Court for certiorari. This Brief is in opposition to that Petition.

Summary of Argument

The Petition for Certiorari should be denied because the petitioner has failed to provide any justification for certification.

A. The order of the District Court, as affirmed by the Court of Appeals, does not conflict with any decision of this Court. Trial courts have authority to fashion relief from discrimination so long as the nature and scope of such relief is limited to correcting the actual effects of the discrimination. The remedy here was tailored precisely to correct admitted imbalances.

B. The decision of the Court of Appeals to affirm the District Court's order in part and remand it in part for clarification is entirely consistent with the decisions of other circuit courts. Most of the cases cited by the Petitioner from other circuits actually support the action of the Second Circuit in the case at bar.

Argument

The Petition For Certiorari Should Be Denied Because No Special And Important Reasons Justify Review By This Court

The Petition before this Court fails to provide any valid basis for review on writ of certiorari. It raises no "special and important reasons" as required by Rule 17, and falls far short of presenting a situation for this Court to issue a writ as a matter of grace. *Wade* v. *Mayo*, 334 U.S. 672, 68 S.Ct. 1270, 1275, 92 L.Ed. 1647 (1948). The petitioner relies on two of the grounds for review set forth in Rule 17: that the decision of the court below conflicts with decisions of this Court, and that it is in conflict with cases decided by Courts of Appeals in other circuits. There is no basis for either contention.

The Court of Appeals for the Second Circuit, by affirming the order of the District Court in part and remanding it in part, was not setting forth new principles of law which might be contrary to established case law. This is not, for example, an instance of "clear conflict" on an important issue such as Fourth Amendment rights. *United States* v. *Dionisio*, 410 U.S. 1, 5, 93 S.Ct. 764, 767, 35 L.Ed.2d 67 (1973), nor is there another circuit which has decided a "substantially identical case" differently. *Brennan* v. *Arnheim and Neely, Inc.*, 410 U.S. 512, 515, 93 S.Ct. 1138, 1141, 35 L.Ed.2d 463 (1973). Rather, the Court of Appeals, with the record of the case before it, was merely applying the requirements for such an order which it had developed in many previous cases and which are completely in accord with the standards set by this Court and the other circuits.

The District Court entered an order to overcome the impact of admitted past segregation based on a reasonable remedy already proven effective. The Court of Appeals approved the order in general, but remanded for clarification of the term "Bridgeport area labor force." The decision of the District Court, as affirmed by the Court of Appeals, may have been disappointing to the BEA, but it is simply not in conflict with any prior decision of this Court or of any other Circuit.

A. *The Decision Below in No Way Conflicts with the Decisions of This Court.*

The Petitioner cites several decisions of this Court and argues that the order below conflicts with them. Even a superficial review of these cases demonstrates that, to the extent they apply at all to the circumstances here, they support, rather than conflict with, the order of the District Court as affirmed by the Court of Appeals. For example, in *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977), this Court reiterated the authority

of the Federal courts to provide broad relief from discrimination. The relief in the *Dayton* case, however, was held to be overly broad, because it was unnecessarily systemwide. The same overbreadth was found in *Milliken* v. *Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1976), in which several school districts had been restructured to correct a violation occurring in only one. The Court of Appeals is not in conflict with these cases because the remedy ordered by the District Court and approved by the Court of Appeals does not suffer from the problems in the *Dayton* and *Milliken* orders. Here, the stipulation of facts filed in connection with the consent decree specifically acknowledged that various acts and omissions of the City Defendants had resulted in racial segregation with an impact on the entire school system. One such impact was an underrepresentation of minority teachers and administrators. The remedy which the BEA seeks to overturn was tailored precisely to correct the nature and extent of the admitted violation. *Dayton Board of Education*, *supra*, 433 U.S. 406, 419-20, 97 S.Ct. 2766, 2775, 53 L.Ed.2d 851 (1977). Moreover, the remedy merely continued the corrective action already undertaken by the local authorities.[1] This is neither a case of "displacement of the local authorities by a federal court," *Id.* at 410, 97 S.Ct., at 2770, nor is there "disparity between the evidence of constitutional violations and the sweeping remedy finally decreed." *Id.* at 419, 97 S.Ct., at 2775. In fact, the order on staff can hardly be said to be a "sweeping remedy."

The same factors which make it clear that the remedy here is well within the limitations defined by this Court in *Dayton* and *Milliken* apply also to other cases cited by the Petitioner,

[1] The Question Presented by the Petitioner is misleading as to the scope and basis of the District Court order, and the status of the case. The parties had stipulated that there had been discrimination in hiring and promotion, and had further stipulated that the suspension of a portion of the local civil service laws had lessened the effects of that discrimination.

such as *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976).[8] The proof of violations was contained in the stipulations of fact. The necessity for relief was obvious, and the appropriateness and effectiveness of the chosen remedy had already been demonstrated even before the District Court's order.

The Petition fails to show any conflict between the remedy at issue and the decisions of this Court.

B. *The Decision of This Court of Appeals is Not in Conflict with the Decisions of Other Circuit Courts.*

It is unclear to the Respondents if the Petitioner is arguing that the District Court's order, as approved by the Court of Appeals, conflicts with the decisions of other circuit courts, or if the Petitioner is alleging instead that the Court of Appeals' partial affirmation of the order was inconsistent with that Court's own previous decisions. If the Petitioner is basing its request for certiorari on the theory of some internal inconsistency within the Second Circuit, such reliance is misplaced. Rule 17 does not contemplate the resolution of inconsistent decisions within a Circuit by "so exceptional a jurisdiction of this Court as that on certification." *Wisniewski* v. *United States*, 353 U.S. 901, 902, 77 S.Ct. 633, 634, 1 L.Ed.2d 658 (1957).

Assuming instead that the Petitioner is alleging conflict between the Second Circuit and the other circuit courts, the Petition fails to support such contention. Even the cases cited by the Petitioner lead to the opposite conclusion.

Dawson v. *Pastrick*, 600 F.2d 70 (7th Cir. 1979), a case on which the BEA relies in attacking the temporary quota ordered by the District Court for Bridgeport, actually

[8] Certain other cases cited in the Petition, e.g., *Fullilove* v. *Klutznick*, 448 U.S. 1148, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) are simply irrelevant to this matter.

demonstrates the similarities between the decisions of the Second Circuit and the Seventh Circuit. *Dawson* presented a case of racial discrimination in employment in which a consent decree was entered. The District Court rejected a proposed hiring quota, but allowed the remedy to include the award of extra seniority points to minority employees. As in the present case, a union intervened. The union expressed reservations about the extra seniority point remedy, but failed to introduce any evidence in support of its criticism. It then appealed. The BEA, too, failed to present evidence in opposition to the relief sought and then appealed.[3] The Seventh Circuit affirmed the portion of the lower court's order including the contested seniority measures, saying that an intervenor has the burden to demonstrate why a remedy is unjustified. *Id.* at 76. This Seventh Circuit decision supports the decision of the Second Circuit on the Bridgeport remedy.

The BEA objects to the temporary quota relief allowed by the Second Circuit for Bridgeport. The Petition cites *United States* v. *City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980), however, in which that circuit court reversed a lower court decision and allowed a proposed consent decree in an employment discrimination case which provided for a numerical goal. Like the Second Circuit in the case at bar, the Fifth Circuit thus approved a *temporary* quota which created no absolute bar to non-minorities. *Id.* at 1366. The *Alexandria* court referred to the line of Fifth Circuit cases "refusing to upset relief involving goals and time tables." *Id.* at 1363.

Moreover, the *Alexandria* decision specifically cited with approval a Second Circuit case, *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420 (2nd Cir.

[3] While the BEA opposes the remedy to increase the representation of minorities on the school system's administrative staff, it failed to present any evidence or any alternate plan. Indeed, it failed even to appear at a hearing scheduled in the matter, nor did it file a brief until specifically ordered to do so by the District Court.

1975), *cert. denied* 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84. In *Kirkland* the Second Circuit had established a test for the appropriateness of setting numerical goals as part of the remedy in a discrimination case. Obviously, there is no conflict between the Second and Fifth Circuits which would warrant a writ of certiorari.

The Petitioner also cites *United States* v. *City of Chicago*, 549 F.2d 415 (7th Cir. 1977), *cert. denied*, 434 U.S. 875, 98, S.Ct. 225, 54 L.Ed.2d 155 (1977). That case presented a question of the appropriate remedy for employment discrimination in the Chicago police department. The lower court had permitted deviation from civil service procedures to continue even after allowable 58% quotas for minorities and women had been met. The Seventh Circuit in that case only rejected *permanent* measures which went beyond what was necessary. The temporary relief with a specific goal allowed by the Second Circuit here is entirely consistent with the *Chicago* decision of the Seventh Circuit. In fact, by remanding to the District Court for clarification of the term, "Bridgeport area labor force," the Second Circuit was tightening up the remedy and insuring that it would be temporary and limited only to the correction of the actual harm.

The fourth case on which the Petitioner relies is *Bryan* v. *Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3rd Cir. 1974),, *cert. denied* 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed.2d 146 (1974). Curiously, *Bryan* addressed not a quota, but rather the question of whether or not a settlement disapproved by more than twenty percent of a certified class should be approved by the court. The Third Circuit upheld the lower court's approval of the *Bryan* settlement, thus lending additional support to the breadth of a trial court's discretion to approve a remedy. As with the other cases cited in the petition, there is clearly no conflict between this case and the actions of the Second Circuit.

In fact, the Petitioner has totally failed to demonstrate a conflict between this Second Circuit's action here and *any* other circuit.

None of the circuits whose cases the Petitioner cites, including the Second Circuit, *favors* either quotas or variations of civil service procedures[4] as remedies of first choice. Both are acceptable, however, when necessary and appropriate to remedy the effects of proven segregation. For Bridgeport, these measures were ordered, on a temporary basis, only after serious consideration.

The District Court held extensive hearings about the consent decree, the later remedy for administrative personnel, and the myriad of details concerning administration of the Bridgeport public schools. There were stipulations of fact as to discrimination, confirmed by findings of the Court in the consent decree. There was a joint memorandum of law setting forth the legal reasoning of the parties which led to the consent decree. The remedy itself had already been proven effective by the actions of the local authorities from 1975 to 1980. The District Court judge had in front of her specific evidence which established that there had been a disproportionately low number of minority administrators. She then reviewed uncontroverted evidence that the City Defendants had appointed minority candidates to administrative positions without following normal civil service requirements for the past five years. On this evidence, she ordered the continuation of the successful program. The Court of Appeals reviewed and approved that order. Nowhere in this process is there a basis for the issuance of a writ of certiorari.

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[4] Presumably even a local civil service procedure like the one at issue here.

Conclusion

For the reasons set forth above, the Petition fails to demonstrate any basis for the granting of a writ of certiorari. The Petition should be denied.

Respectfully submitted,

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